

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

WARD FRANCIS WEAVER,  
Petitioner,  
vs.  
Robert K. Wong, as Acting Warden of  
San Quentin State Prison,\*  
Respondent.

Case No. 1:02-cv-05583 -AWI

DEATH PENALTY CASE

CASE MANAGEMENT ORDER  
ESTABLISHING POST-EXHAUSTION  
SCHEDULE FOR PHASE II

This matter is before the Court on the December 10, 2009 request from Respondent Robert K. Wong, as acting Warden of San Quentin State Prison (the “Warden”) for a scheduling conference to set dates for motions and responsive pleadings. The request follows the filing of an Amended Petition by Petitioner Ward Francis Weaver (“Weaver”) on September 1, 2009, and the earlier completion of state exhaustion proceedings before the California Supreme Court on August 26, 2009.

Based on the Court’s review of the record on file in this matter, it is apparent that Weaver intended to lodge his proposed Amended Petition during the state exhaustion process, rather than after relief was denied. He advised the Court he would lodge his Amended Petition once informal briefing in state court was completed, including the State’s informal opposition and his anticipated informal reply to that opposition. The California Supreme Court never ordered the State to file an informal opposition, and instead, issued a summary denial of the pending state petition on August 26, 2009. All claims were denied on the merits as well as on procedural grounds. Although Weaver had been directed to advise this Court when state proceedings were terminated (March 6, 2004 Order, doc. 56), he did not do so. He filed his last quarterly status report on June 1, 2009 advising that “the California Supreme Court has

\*Robert K. Wong is substituted for his predecessor Robert L. Ayers, Jr., as Action Warden of San Quentin State Prison pursuant to Federal Rule of Civil Procedure 25(d).

1 not issued any order requested an informal response from the State to petitioner's habeas corpus  
2 petition." His next filing in this Court was his Amended Petition, on September 1, 2009. It was not until  
3 the Warden brought this issue to the Court's attention by the present request that the Court became aware  
4 the California Supreme Court had denied Weaver's state exhaustion petition.

5 Under case management procedures that have been developed over the last several years, *see*  
6 Fresno Attorney Guide posted on the Court's web page ([www.caed.uscourts.gov](http://www.caed.uscourts.gov), Attorney Info/ Fresno/  
7 Forms/ Case Management and Budgeting in Capital Cases), it is clear that the procedural status of the  
8 present action is in Phase II. That is, although the Amended Petition is on file, no answer has been filed,  
9 and exhaustion has not been finally determined. In order to provide the Warden and his counsel  
10 sufficient opportunity to review the allegations is Weaver's 400-plus page Amended Petition, the Court  
11 will provide sufficient time for the Warden to file his answer. The Court is mindful of counsel's other  
12 capital case litigation responsibilities.

13 GOOD CAUSE APPEARING THEREFOR,

- 14 1. The Warden shall file his answer to the Amended Petition, without points and authorities,  
15 consistent with Rule 5 of the Rules Governing § 2254 Cases, no later than February 12, 2010.  
16 The answer shall raise all substantive and procedural affirmative defenses the Warden intends  
17 to pursue
- 18 2. Within 30 days from the filing of the Warden's answer, the parties shall meet and confer to  
19 discuss their respective positions about the exhaustion status and timeliness (under 28 U.S.C.  
20 § 2244(d)(1)) of the Amended Petition. The parties shall file a joint statement setting forth their  
21 respective positions concerning exhaustion and timeliness no later than April 16, 2009.
- 22 3. The matter thereafter will be taken under submission to resolve the parties' dispute (if any). If  
23 the parties agree on exhaustion and timeliness, the Court will order further proceedings to bring  
24 culmination to Phase II and move the matter into Phase III.

25 IT IS SO ORDERED.

26  
27 DATE: December 11, 2009

/s/ Anthony W. Ishii  
Anthony W. Ishii  
United States District Judge